SUPREME COURT, U.S.
FILED
NOV 2 2 2004
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No. 04-534

**In The Supreme Court Of The United States**

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CORNELIUS WAYNE HOEVENAAR,
*Petitioner,*

v.

ALAN LAZAROFF,
*Respondent.*

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*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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# RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does application of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), codified in relevant part at 42 U.S.C. § 2000cc-1, to prisons violate the Establishment Clause or other constitutional limitations on Congress's powers?

Respondent submits that this case should be held, without further action, pending disposition of *Cutter v. Wilkinson*, case No. 03-9877. Respondent also submits that Petitioners' unexplained request for a stay should be denied.

## STATEMENT OF THE CASE

Petitioner Hoevenaar is an Ohio prisoner serving a life sentence. Respondent Lazaroff, the warden of the prison where Hoevenaar is housed, required him to comply with an Ohio regulation requiring prisoners to keep their hair short.

Hoevenaar, who professes a Native American religion that requires its adherents to refrain from cutting their hair, sued, claiming that enforcement of the regulation violated his rights under RLUIPA and the Free Exercise Clause of the First Amendment. He also sought a preliminary injunction against enforcement of that regulation.

A hearing was held where the State showed the regulation has two primary purposes. One is to thwart escape attempts by limiting inmates' ability to elude recapture by cutting their otherwise long hair in order to change their appearance. The other is to suppress contraband by limiting inmates' ability to hide small items in their hair. Pet. at A21-A25

The evidence showed that Hoevenaar has an unusually extensive record of both behaviors. He has been involved in three escape attempts, the most recent being in 2002. It also showed that he has a long history of possessing contraband. *Id.* at A37.

The district court concluded that, given those facts, enforcement of the regulation was reasonable under the standard set in *Turner v. Safley*, 482 U.S. 78 (1987). It therefore held that Hoevenaar had no prospects for success

on his First Amendment claim and denied injunctive relief on that basis.

However, that court found that that Hoevenaar had a strong likelihood of success under RLUIPA because it felt that there were less restrictive ways to deal with the escape and contraband problems motivating the grooming regulation. More specifically, it found that those concerns could be adequately addressed by granting Hoevenaar an individualized exemption allowing him to wear some, but not all, of his hair long. It therefore entered an injunction requiring that he be permitted to wear a Kouplock, a two by two inch column of hair, beyond the length allowed by the grooming regulation.

Lazaroff took an interlocutory appeal under 28 U.S.C. § 1292, arguing, *inter alia*, that the district court misapplied RLUIPA's least restrictive means requirement. While that appeal was pending in the Sixth Circuit, that court held in *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003), that RLUIPA violates the Establishment Clause. The panel hearing Hoevenaar's case concluded that the injunction must be reversed because *Cutter* removed the sole basis for that relief. *Hoevenaar v. Lazaroff*, 108 Fed. Appx. 250 (6th Cir. 2004). That decision made no independent analysis of RLUIPA's constitutionality

This petition followed.

## DISCUSSION

Respondent Lazaroff submits that this case should be held, without further action, pending the outcome of *Cutter*. Also, the Sixth Circuit's decision should not be stayed.

### A. Review of the issue is warranted, but the Court is already reviewing this issue in *Cutter*.

Hoevenaar correctly states that the circuits are split on RLUIPA's constitutionality. That split concerns an important question of federal law because of RLUIPA's significant, and deleterious, effect on day-to-day prison operations across the country. The question presented is therefore worthy of review and will be resolved in *Cutter*.

### B. Consolidation with *Cutter* would complicate that case with no offsetting benefit.

However, Hoevenaar's request to consolidate his case with *Cutter* should be denied for two reasons.

First, it would complicate the already complex proceedings in *Cutter*. That case involves three groups of prisoners pressing distinct types of claims and two sets of counsel defending RLUIPA's constitutionality. Briefing is already underway, and due to various extensions, *Cutter's* schedule has already been modified twice. Folding this case into those proceedings would inject new parties, new facts and another set of counsel, and likely require further modification of the *Cutter* case schedule. That would unduly disrupt *Cutter*.

Second, no offsetting benefit would result from consolidating this case with *Cutter*. The *Cutter* record is fully developed, both legally and factually, and this case provides nothing new.

In short, this case would add nothing but complexity and delay to *Cutter*. That counsels strongly against consolidation.

**C. No stay is warranted.**

Finally, Hoevenaar's request for a stay should be denied because he has not explained why one is needed. Rule 23.3 requires that he "set out with particularity" the grounds for that relief but he has made no argument, a particularized or otherwise, in support of a stay. That unexplained request for extraordinary relief should be denied.

## CONCLUSION

For the above reasons, the Court should simply hold this case pending resolution of *Cutter*. The Court should deny Petitioner's unsupported request for a stay.

Respectfully submitted,

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November 22, 2004